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International (cyber)stalking: impediments to investigation and prosecution¹

Suzan van der Aa

1. Introduction

The history of anti-stalking legislation is an excellent example of globalization in itself. Within no time the legislative ‘innovation’ of the crime of stalking by the state of California was picked up by other states and by other countries all around the world.² It took less than five years after the first criminalization in 1990 before the other fifty American states and the District of Colombia had followed the Californian precedent. Quickly the trend spread throughout the world and was passed onto several European countries, Canada, Australia, New Zealand and even Japan. Consequently, the conduct has generated more and more academic and legislative attention.³ What has not been paid much attention to is that nowadays – like trends within the legal domain – stalkers and their victims are able to travel across national borders just as easily. While sometimes the geographical distance between stalker and victim forms a natural impediment to the harassment, there have been cases in which the stalking continued despite the separation or – in the case of cyberstalking – where stalker and victim had never even met in the offline world.

An example of an international stalking case involved a Dutch female victim who lived near the Belgian border and who was being harassed by her former Belgian boyfriend.⁴ He kept driving by her house, following her around, sending her e-mails and calling her on the phone. Despite the – according to the victim – abundance of evidence, the Dutch police told her that ‘nothing could be done’, since the stalking was carried out by a Belgian citizen who, furthermore, partly carried out his deviant behaviour from abroad.

As appears from the example, the police sometimes shy away from taking action because of the international nature of the case. Where the investigation and prosecution of stalking already poses various problems on the national level, these difficulties are multiplied when an international component comes into play. Inter-jurisdictional difficulties could emerge. Which jurisdiction is responsible for regulating the stalking? And how would the international investigation and prosecution take shape? Naturally, these problems can be witnessed with other crimes that transcend national borders as well. What is unique about stalking, however, is the lack of consensus on a definition and the absence of a criminal provision in many countries. Where crimes such as the distribution of child pornography can count on international support when it comes to the development of international standards, the criminalization of stalking in national legislation alone is already controversial. Many difficulties arise when different states with a different cultural and legal background have to reach an agreement upon the matter.

¹ The author would like to thank Theo de Roos and Marc Groenhuijsen for reviewing previous drafts of this chapter.

² According to the Modena report, it was not the state of California that had the scoop on the criminalization of stalking in 1990, but it was Denmark that had already criminalized the conduct back in 1933 (Modena Group on Stalking, *Protecting women from the new crime of stalking: A comparison of legislative approaches within the European Union. Final report* (University of Modena and Reggio Emilia for the European Commission, 2007), p. 79). However, since it was the Californian legislation that inspired the international (legislative) attention for the conduct this legislation is used as a point of reference.

³ A. Groenen, *Stalking. Risicofactoren voor fysiek geweld*, Antwerpen: Maklu 2006, p. 16.

⁴ This example is derived from a victim questionnaire that was carried out by the author within the scope of her forthcoming PhD thesis.

One form of international stalking that deserves special attention is international *cyberstalking*. Cyberstalking - or the repetitive harassment or threat of an individual through the internet or other electronic means of communication⁵ - has no geographical limitations. With the introduction and enormous expansion of the internet, criminals have found a new means to carry out their devious behaviour. Crimes such as identity theft, extortion and distribution of child pornography that were traditionally perpetrated in the offline world can now be witnessed online as well and often to an even larger extent. National boundaries that served as a restriction to offline crimes have no meaning on the *World Wide Web*. The same holds true for crimes that have only recently been criminalized like stalking. As a consequence, some authors have expressed the need to consider how states can work together to counter cases of international cyberstalking.⁶

The aim of this article is to see what problems arise in the investigation and prosecution of international (cyber)stalking and whether some of these problems could be solved. In order to answer this question there will first be an assessment of whether the problem is extensive and serious enough to justify (inter)national action or regulation (chapter 2). The United States were the first to recognise that stalking could easily expand beyond state borders and in reaction the federal government designed a federal act to enhance the investigation and prosecution of interstate stalking. The American anti-stalking act will be looked at to see whether it can serve as an example in bridging the differences between different jurisdictions (chapter 3). Characteristic for the European situation is that many European countries have not criminalized (cyber)stalking at all and those that have all use different definitions. The fourth chapter takes stock of the ways in which European countries have criminalized the conduct. If we were to design an international approach to counter stalking, how would we overcome the current differences in stalking legislation or even the absence of legislation and where do we look for common ground? Chapter 5 looks at the impediments to investigation and prosecution that arise in a national context and chapter 6 focuses on the difficulties of dealing with international crime in general and international (cyber)stalking in specific. Finally, the Convention on Cybercrime will be analysed to see if it can serve a purpose in the combat against international (cyber)stalking (chapter 7).

2. Prevalence and seriousness of international (cyber)stalking

2.1. International stalking

To date, over 19 years after the state of California enacted its anti-stalking legislation that sparked the international trend of criminalizing the conduct, there is still no universally agreed upon definition of stalking. Amongst other problems, this also results in varying estimations

⁵ P. Bocij, 'Victims of Cyberstalking: An Exploratory Study of Harassment Perpetrated via the Internet' (2003) 8 *First Monday*, 10 <www.firstmonday.org>. In 2004, Bocij proposes the following, more specific definition: 'A group of behaviors in which an individual, group of individuals, or organization uses information and communications technology to harass another individual, groups of individuals, or organization. Such behaviors may include, but are not limited to, the transmission of threats and false accusations, identify theft, data theft, damage to data or equipment, computer monitoring, solicitation of minors for sexual purposes, and any form of aggression. Harassment is defined as a course of action that a reasonable person, in possession of the same information, would think causes another reasonable person to suffer emotional distress.' A cyberstalking cases is furthermore: '[...] one in which the stalker begins to harass the victim via ICT and/or in which *most* of the harassment is based on the use of ICT' (P. Bocij, *Cyberstalking: Harassment in the Internet Age and How to Protect Your Family* (Westport, CT, Praeger Publishers, 2004), p. 15).

⁶ P. Tjaden, 'Stalking in America: Laws, Research, and Recommendations' in R.C. Davis, A.J. Lurigio and S. Herman (eds.), *Victims of Crime* (3rd edn, California, Thousand Oaks, 2007), pp. 75-89 at p. 85.

on the prevalence of the conduct. In thirteen large-scale studies on stalking prevalence within the general population lifetime prevalence estimates range from 4.5 to 23.4 percent of the population and last year prevalence rates from 1.6 to almost 6 percent.⁷ It has affected between 7 to 32.4 percent of the adult female population and 2 to 15 percent of the male population once in their lives, with a last year involvement of 1 to 9 percent of women and 0.4 to 8.9 percent of men.

Despite these wide variations, several trends or characteristics have emerged. Even the studies that held on to the most restrictive criteria reported a significant proportion of the population to be affected by the conduct. Another finding that finds support throughout the studies is that, in the general population, women are more likely than men to experience stalking victimization.⁸ Furthermore, young persons are more at risk to become the victim of stalking than older people.⁹

When it comes to the impact of stalking the high prevalence numbers are especially worrying given that this behaviour imposes a great strain on the private lives of the victims. Several studies have indicated that victims experience personality changes, suffer from insomnia and they often show symptoms of Post Traumatic Stress Disorder or other psychiatric and psychological complaints.¹⁰ Thirty percent of female victims and twenty percent of male victims sought psychological counselling and seven percent never returned to work as a result of the stalking.¹¹ Some victims had to endure profound alterations such as relocating to another place or changing identities in order to protect themselves or their loved-ones.¹² According to a study which had studied female murder victims who had been killed by intimate partners, 76 percent of the murder victims and 85 percent of the attempted murder victims had been stalked by their intimate partners in the year prior to their murders.¹³

Unfortunately, none of the aforementioned prevalence studies included in their research design a question on *international* stalking so the question as to the prevalence or the impact of international stalking remains unanswered.

2.2. *International cyberstalking*

It may not come as a surprise that characterizing and defining the new concept of cyberstalking has proven equally difficult as in the case of its offline equivalent. A complicating factor in this respect is that there is no consensus on whether cyberstalking should be viewed as nothing more than an extension of offline stalking, or whether it should be viewed as an entirely new form of deviant behaviour, albeit related to offline stalking.¹⁴

⁷ For an overview of the thirteen studies and an estimate of the Dutch prevalence of stalking see S. van der Aa and M. Kunst, 'Prevalence of stalking in the Netherlands' (2009, forthcoming) *International Review of Victimology*.

⁸ See B.H. Spitzberg and W.R. Cupach, 'The state of the art of stalking: Taking stock of the emerging literature' (2007) 12 *Aggression and Violent Behavior*, 64-86.

⁹ For example, R. Purcell, M. Pathé and M.E. Mullen, 'The prevalence and nature of stalking in the Australian community' (2002) 36 *Australian and New Zealand Journal of Psychiatry*, 1, 114-120; S. Morris, S. Anderson and L. Murray, *Stalking and harassment in Scotland* (Edinburgh: Scottish Executive Social Research, 2002) and T. Budd and J. Mattinson, *the extent and nature of stalking: Findings from the 1998 British Crime Survey* (London: Home office, 2000).

¹⁰ For example E. Blaauw, L. Sheridan and F.W. Winkel, 'Designing Anti-stalking Legislation on the Basis of Victims' Experiences and Psychopathology' (2002) 2 *Psychiatry, Psychology and Law*, 136-145.

¹¹ Tjaden and N. Thoennes, *Stalking in America: Findings from the National Violence Against Women Survey* (Washington, DC: National Institute of Justice and Centers for Disease Control and Prevention, 1998).

¹² *Ibid.* According to that study 11 percent of the female stalking victims had relocated because of the harassment.

¹³ J.M. McFarlane, J.C. Campbell, S. Wilt, C.J. Sachs, Y. Ulrich and X. Xu, 'Stalking and Intimate Partner Femicide' (1999) 3 *Homicide Studies*, 4, 300-316.

¹⁴ Bocij, *Cyberstalking*, p. 12.

Although worldwide data on the extent of cyberstalking do not yet exist, there is increasing empirical evidence that cyberstalking is a serious and growing problem. Estimates on the extent of cyber-stalking vary considerably. They range from 474,000 to 18.75 million annual cyberstalking victims across the world.¹⁵ Still many estimates are based on flawed assumptions or unreliable and outdated statistics.¹⁶ But even if we depart from the most conservative estimate of 474,000 victims a year this still supports the idea that the problem is widespread. It is also important to note that at the moment internet has over 1.46 billion users worldwide¹⁷ on a world population of over 6 billion people and that its growing potential is still not exhausted. With the growth of internet, the crime numbers will rise as well. Large metropolitan areas such as Los Angeles and New York City have therefore already established specialized crime units that investigate and prosecute cases in response to the numerous incidents of cyberstalking.¹⁸

Cyberstalking is predicted to become even more common than offline stalking, due to several crime stimuli of the internet. The internet offers large opportunities to utilize advanced computer programs to spread viruses, distribute spam or to hack another person's computer system. Stalkers have no difficulties finding a victim, while the chances of being confronted with the consequences of their actions are negligible. For the average internet user, it is not very hard to conceal ones identity and data can be altered, moved or deleted within seconds, thereby destroying the evidence. Proving that a suspect has committed cyberstalking can cost a lot of effort hence the chances of being arrested or sanctioned are small.¹⁹

Even though it is often perceived as less serious,²⁰ cyberstalking can cause just as much psychological, emotional or economical harm as offline stalking. Of the respondents who had been subjected to cyberstalking almost a quarter valued the stress they had experienced as a consequence of the stalking with a ten on a ten-point scale.²¹ Furthermore, the posting or otherwise distributing of false information on bulletin boards, chat-rooms or through direct e-mails, also known as 'cyber-smearing', can even be more harmful than equivalent behaviours in the offline world, since information on the internet is accessible to a large audience and it often remains accessible for a long period of time.²² Also there have been incidents reported of cyberstalking cases that even result in the physical attack of the victim. In other words, cyberstalking can have a negative impact on the victim that is similar to the consequences of real life stalking. Cybercrime and cyberstalking have even been said to cost 'millions of dollars in computer and network damages to businesses and fear and physiological trauma to millions of cyberstalking victims'²³ although – again – this statement lacks empirical evidence.

¹⁵ *Ibid.*, p. 47.

¹⁶ *Ibid.*

¹⁷ See World Internet Usage and Population Statistics, <www.internetworldstats.com> (Januari 2009).

¹⁸ U.S. Department of Justice, *Stalking and Domestic Violence: Report to Congress under the Violence Against Women Act* (Washington, D.C.: National Institute of Justice, 2001), p. 7.

¹⁹ Bocij, 'Victims of Cyberstalking'.

²⁰ Bocij, *Cyberstalking*, p. XII of the introduction. The U.S. Attorney General also reports that the lack of physical contact may create the misconception that cyberstalking is less serious than offline stalking (U.S. Department of Justice, *Cyberstalking. A new challenge for law enforcement and industry* (Washington, D.C.: Report of the Attorney General to the Vice President 1999).

²¹ Bocij sent a questionnaire to 169 respondents who were selected by snowball sampling via e-mail. Of this sample only one-third had suffered from actual cyberstalking experiences. The design of the study will have a bearing on the generalizability of the findings, a fact that the author himself generously admits (Bocij, 'Victims of Cyberstalking').

²² *Ibid.*

²³ A. R. Roberts and D. Green, 'Crisis Intervention With Victims Of Violent Crimes' in R.C. Davis, A.J. Lurigio and S. Herman (eds.), *Victims of Crime* (3rd edn, California, Thousand Oaks, 2007), pp. 255-266 at p. 256.

On the prevalence and seriousness of *international* cyberstalking, when stalker and victim reside in different countries or have different nationalities, there is no empirical or even anecdotal evidence whatsoever. The existent literature on cyberstalking has mainly been restricted to national states only. If the topic is brought up, this happens only in an assessment of general notions of procedural law and not in an empirical fashion. For example, many authors do recognise that it is difficult or even impossible to prosecute a stalker whose victims are located in a foreign country,²⁴ but this assessment has not lead to subsequent study or contemplation.

All in all there is an astounding lack of research on the topic. Where the research on the prevalence and seriousness of national (cyber)stalking as such is highly speculative already, the research on *international* (cyber)stalking is even non-existent. Despite the absence of 'hard data' the US government has drafted special legislation to deal with this type of crime.

3. (Cyber)stalking legislation in the United States

In the United States the government quickly recognized the possible multi-jurisdictional nature of stalking and the problems that came along with it. Next to the difficulties that may derive from international (cyber)stalking the American police and prosecution service have to deal with the complexity of a federal system as well. Given the fact that stalking is regulated on a state level, this means that there is a concern to harmonize state laws and procedures within the United States. The United States opted for a two-track approach to harmonize state legislation and to counter interstate (cyber)stalking: first, the creation of a Model Anti-Stalking Code and second, the adoption of a federal anti-stalking law.

In 1993, before the majority of the states had drafted anti-stalking legislation, the National Institute of Justice developed a model anti-stalking code to encourage states to adopt anti-stalking measures themselves and to provide them with a template that was expected to withstand the anticipated constitutional challenges.²⁵ As a result many states incorporated provisions of the code in their states statutes. Still there are differences between the various anti-stalking laws. States differ for example in their anti-stalking legislation as to the type of repeated behaviour that is prohibited, whether a threat is required, the reaction of the victim to the stalking and the intent or *mens rea* of the perpetrator.²⁶

Although most (cyber)stalking cases will fall within the jurisdiction of state authorities there are instances where state law is inadequate, where questions of jurisdiction arise or where state agencies do not have the expertise or resources to investigate and prosecute a case.²⁷ State law therefore needed to be supplemented by federal law for cases that did not stay within the domain of one single state.

In 1996, a federal interstate stalking law was enacted that prohibits individuals from travelling across a state line with the intent to injure or harass another person.²⁸ In 2000, the Violence Against Women Act amended the interstate stalking law so that it would include travelling across national borders. It also expanded the statute to cover conduct with the intent to kill or intimidate another person. Cyberstalking perpetrated by a stalker who is in a

²⁴ Bocij, *Cyberstalking*, p. 172.

²⁵ National Criminal Justice Association, *Project to Develop a Model Anti-Stalking Code for States* (Washington D.C.: U.S. Department of Justice, National Institute of Justice, 1993).

²⁶ U.S. Department of Justice, *Strengthening Antistalking Statutes* (OVC Legal Series Bulletin nr.1, 2002).

²⁷ U.S. Department of Justice, *Report to Congress*, p.12.

²⁸ 18 U.S.C. § 2261A.

different state or tribal jurisdiction than the victim is covered by paragraph 2261A(2). This paragraph makes it a federal crime to:

“stalk someone across state, tribal or international lines, using regular mail, e-mail, or the Internet (i.e. cyberstalking). The stalker must have the intent to kill or injure the victim, or to place the victim, a family member, or a spouse or intimate partner of the victim in fear of death or serious bodily injury.”²⁹

In 2006 an amendment expanded the federal stalking statute to include ‘conduct which causes the victim substantial emotional distress’ and that would ‘cover surveillance of a victim by a global positioning system’.³⁰

In drafting the federal statute, the federal legislator could have chosen to bridge the variations that exist among state stalking laws. One could think of using the strictest definition so that the prohibited behaviour was already criminalized in every state. What is remarkable is that the federal regulation is in fact not in line with many of the state anti-stalking laws or the Model Anti-Stalking Code. In state law stalking is generally defined as ‘the wilful or intentional commission of a series of acts that would cause a reasonable person to fear death or serious bodily injury and that, in fact, does place the victim in fear of death or serious bodily injury’.³¹ In contrast to the majority of state laws, the federal law does not require an actual reaction from the victim to classify conduct as cyberstalking. So the stalking does not have to cause the victim to actually fear for death or bodily injury. Furthermore, the federal law is a ‘specific intent’ crime, meaning that it requires proof that the stalker intended to cause the victim to fear death or personal injury. Many states, on the other hand, handle a ‘general intent’ requirement, implying that the stalker simply intentionally committed prohibited acts without necessarily intending the consequences of those actions.³² On top of that, cyberstalking with an inter-jurisdictional component is criminalized even in states where cyberstalking as such has not been criminalized at all. In Illinois, Maryland, Hawaii, Connecticut and Wisconsin, the anti-stalking statutes all use narrow definitions of stalking that involve following, approaching or otherwise maintaining a physical proximity to a person.³³ Cyberstalking that is not supplemented with behaviour that has a connexion with the offline world is not subjected to penalty in those states.

The power to impose federal legislation that is not in conformity with state law is inherent in the American federal system, but things become more complicated in an international context when states are autonomous and have the right to withhold from ratification if they do not consent with certain provisions. Before assessing what legislation would be most suitable to deal with international stalking in the European – or even in a global – context and how this legislation needs to be worded in order for it to succeed, it is necessary to first have a look at the way stalking is criminalized in most European member-states. If there is sufficient common ground, drafting anti-stalking legislation that is widely accepted will not be that complicated.

²⁹ <<http://www.mincava.umn.edu/documents/factsh1/factsh1.html>>.

³⁰ National Center for Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking* (Washington, D.C.: National Center for Victims of Crime, 2007), p. 11 (18 U.S.C. § 2261A(2)(B) and 18 U.S.C. § 2261A(2)(A)).

³¹ U.S. Department of Justice, *Strengthening Antistalking Statutes*. This is in conformity with Section 2 of the Model Anti-Stalking Code.

³² For more information on the division between ‘specific intent crimes’ and ‘general intent crimes’ see the National Center for Victims of Crime, *Model Stalking Code Revisited*, p. 32. For that matter, the new Model Stalking Code as drafted by the National Center for Victims of Crime prefers ‘general intent’ over ‘specific intent’ just as the 1993 Model Anti-Stalking Code (p. 32-33).

³³ U.S. Department of Justice, *Strengthening Antistalking Statutes*.

4. (Cyber)stalking legislation in Europe

In 2007 a report was published that contained the results of a project aimed at collecting and analysing the legal regulations on stalking across the European Member States.³⁴ The report paints a picture of a highly differentiated manner to tackle the problem of stalking across Europe. The differences already begin with the term ‘stalking’. Where the American states at least share common words for the conduct, the - non Anglo-Saxon - European Member States use native words or expressions that fully or only partially cover the concept of stalking. More importantly, in contrast to the United States where all states have criminalized stalking, only 8 out of the 25 European countries have a specific law against stalking.³⁵ Of the 17 countries that had not enacted an anti-stalking law, half indicated that they felt the need to pass one, but the other half did not think this was necessary.³⁶ These Member-States were already satisfied with the existent legislation or society did not perceive stalking as a problem.

When we focus on the Member States that have enacted specific laws to counter stalking, there is still an apparent lack of common ground. Many of the American laws were in one way or another based on or inspired by the Model Anti-Stalking Code, thereby sharing certain common features, but the European countries could not depart from an exemplary code. As a result, anti-stalking acts differ on various aspects: where the reaction of the victim is a qualifying element of the offence of stalking in the UK, Ireland and Malta, it is not included in the definition of stalking in Austria, Belgium, and the Netherlands; where certain jurisdictions require the perpetrator to have had ‘intent’, others do not think this a constituent of stalking at all, not even in the sense of ‘general intent’; where Belgian and Austrian judges only have the penalty of imprisonment at their disposal, the other countries have opened up the possibility of imposing a fine as well or instead; where Germany and Austria have clearly specified the behaviours of the stalker that represent stalking, other jurisdictions make use of more generic definitions without an enumeration of the possible stalking acts; and where most Member States will not define a conduct as stalking unless it consists of a course of conduct of at least two occasions, in Belgium and Malta a single incident can suffice.

Table 1: Stalking legislation in 8 European countries

Countries	Intent of the perpetrator	Anxiety / fear/ expectation of violence by the victim	Imprisonment
Austria	-	-	Max. 1 year
Belgium	Yes	-	Max. 2 years
Denmark	Yes	Yes	Max. 2 years

³⁴ Modena Group on Stalking, *Protecting women*

³⁵ Actually with the recent Italian criminalization there are now 9 countries that have enacted specific anti-stalking legislation..

³⁶ The countries that felt the need to pass anti-stalking legislation were Italy, Portugal, Greece, Sweden, Finland, Cyprus and Luxembourg. The countries that did not feel this necessity were Estonia, Slovakia, Poland, Hungary, Lithuania, Spain and Slovenia (Modena Group on Stalking, *Protecting women*, p. 12).

Germany	Yes	Yes	Max. 10 years
Ireland	-	Yes	Max. 7 years
Malta	-	Yes	Max. 6 months
Netherlands	Yes	-	Max. 3 years
United Kingdom	-	Yes	Max. 5 years

Certain differences only appear to be superficial. In Belgium, for example, nobody has ever been charged with or convicted for stalking because of one single incident.³⁷ Other differences, however, are more substantial. It appears as if two distinct models have emerged.³⁸ On the one hand there is the model of the English-speaking countries with their emphasis on the reaction of the victim and on the other hand there is the continental European model which, especially in the most recent laws, seems to focus on the stalker's ways of conduct and his or her intentions. In contrast to the UK, Ireland and Malta, the reaction of the victim is not a qualifying element of the crime of stalking in Austria, Belgium, Germany, Denmark and the Netherlands. These countries appear to place more emphasis on the 'types of behaviour and/or the intent of the stalker or on concepts such as privacy or the disturbance of the peace'.³⁹ In other words, variations in legislation also appear to derive from even more substantial differences, namely different opinions on what is so deviant about stalking behaviour and why it deserves punishment and criminalization in the first place. The continental anti-stalking laws stand out for the great importance given to the right to privacy, whereas the Anglo-Saxon countries, with their emphasis on anxiety of the victim seem to take the right to live without fear as a justification for anti-stalking legislation.

These differences may become less apparent in the future. In the U.S. more and more states are adopting anti-stalking legislation in which the victim is no longer supposed to have suffered a certain level of fear – e.g. fear of bodily injury or death - but where it suffices if a reasonable person would suffer emotional stress, because of the harassment. Furthermore, a number of courts have held that this emotional distress no longer needs to be proven by independent expert testimony.⁴⁰ It seems as if the focus on the mental effects of a victim is slowly sliding towards a more objective standard.

5. Investigation and prosecution of (cyber)stalking on a national level

The national investigation and prosecution of stalking appears problematic and it seems as if the difficulties generally arise in an early stage of the criminal justice procedure. Several publications paint a picture of a criminal justice practice defined by low reporting and high attrition rates.⁴¹ On top of that, anecdotal evidence suggests that a part of the victims are

³⁷ This information was given to the author during a personal conversation with Wim d'Haese - a Belgian Chief of Police of the Leuven district.

³⁸ Modena Group on Stalking, *Protecting women*, p. 69.

³⁹ *Ibid.*, p. 70.

⁴⁰ National Center for Victims of Crime, *Model Stalking Code Revisited*, p. 48.

⁴¹ For example, R.-M. Bruynooghe, A. Vandenberk, L. Verhaegen, A. Colemont and I. Hens, *Geweld in het meervoud: Een kwalitatieve benadering van de betekenissen rond geweldvormen in België*

dispatched in an even earlier stage. Victim Support Netherlands estimates that at least 25% of the stalking victims are involuntarily sent away from the police station without even having a registration taken down, let alone a report.⁴²

Another recurring theme is the inactiveness on the part of the police.⁴³ Taking into account that only a part of the stalking cases is reported to the police, it is remarkable that in a significant part of the reported cases the police remain inactive. In the United States, about half of the stalking incidents were reported to the police, however in 18.9% of these cases the police did nothing.⁴⁴

The disinclination of law enforcement officers to intervene may possibly be caused by the high attrition rate due to the withdrawal of the complaint by the victim.⁴⁵ As in other cases of interpersonal violence, the police sometimes believe that arresting the offender is a waste of time, because victims are inclined to drop charges.

A second explanation for police inaction could lie in the perceived difficulty to procure sufficient evidence.⁴⁶ The collection of evidence in criminal cases needs to live up to a higher standard than the one used in civil law suits. Criminal proceedings are encumbered by constitutional protections such as due process of law and proof beyond reasonable doubt. Given the ongoing and often varying pursuit tactics, the thin line between legal and illegal behaviour, the lack of obvious injury, and the unpredictable nature of stalking, police and public prosecution may believe the evidentiary threshold too high in many stalking cases.

Finally, the police sometimes seem to trivialize stalking. In a German study two-third of the 48 victims who had been into contact with the police were very satisfied with their work, but only half of the respondents felt being taken seriously.⁴⁷ In a larger study of 190 victims the result was even more sobering: 73% did not feel being taken seriously by the police and 86% thought that the steps that were taken were insufficient.⁴⁸ A reason for the lack of proper treatment may be found in the disinclination to acknowledge stalking as a genuine crime worthy of punishment.⁴⁹ Stalking incidents are dismissed as ‘only domestic’ or as private matters in the relational sphere that are inappropriate for legal intervention.⁵⁰

Also in the experience of the National Center for Victims of Crime stalkers often ‘get away’ with their criminal behaviour, because the burden of proof is too high, because stalking

(Diepenbeek/Louvain-la-Neuve: SEIN, 2003) and A. Groenen, *Stalking: Risicofactoren voor fysiek geweld* (Antwerpen/Apeldoorn: Maklu, 2006).

⁴² This estimation was expressed during a personal conversation of the author with Mrs Marie-Louise Janssen-Brouwer, the former research director of the organization. Some of the victims that had filled out the questionnaire as referred to in note 4 confirmed that they had been sent away without having a registration taken down. .

⁴³ For example, E. Finch, *The criminalisation of stalking: Constructing the problem and evaluating the solution* (London: Cavendish, 2001) and Morris, Anderson and Murray, *Stalking and harassment in Scotland*.

⁴⁴ Tjaden & Thoennes, *Stalking in America*.

⁴⁵ Finch, *Criminalisation of stalking*.

⁴⁶ For instance, K.L. Attinello, ‘Anti-stalking legislation: A comparison of traditional remedies available for victims of harassment versus California Penal Code Section 646.9 (California Anti-Stalking Law)’ (1993) 24 *Pacific Law Journal*, 4, 1945-1980; Groenen, *Stalking* and M. Malsch, *De Wet Belaging: Totstandkoming en toepassing* (Nijmegen: Ars Aequi Libri, 2004).

⁴⁷ Bettermann in J. Hoffmann, ‘Stalking: Polizeiliche Prävention und Krisenmanagement’ (2003) 12 *Kriminalistik*, 726-731.

⁴⁸ Hoffmann, ‘Stalking’.

⁴⁹ M. Rupp, *Rechtstatsächliche Untersuchung zum Gewaltschutzgesetz: Zusammenfassung: Ein Überblick über die Ergebnisse aller Teilstudien* (2005, retrieved May 9, 2008, from Bundesministerium der Justiz website: <http://www.bmj.bund.de>).

⁵⁰ Morris, Anderson and Murray, *Stalking and harassment in Scotland* and B.H. Spitzberg, ‘The tactical topography of stalking victimization and management’ (2002) 3 *Trauma, Violence and Abuse*, 261-288.

is only a misdemeanour crime, because many stalking behaviours are viewed as harmless and because current state laws do not address the full range of stalking behaviours.⁵¹

For a crime in which it is already hard to have the national police take an interest, initiating an international investigation and prosecution could be a significant problem. Next to the difficulties of interesting the local police to take charge, which problems could arise in an international context? In order to answer this question, it is necessary to have a look at jurisdiction, extradition and mutual assistance.

6. Investigation and prosecution of (cyber)stalking on an international level

6.1. Jurisdiction

One of the issues that always needs to be addressed in cases of cross-border crimes is the question of jurisdiction. Which country has the right to prosecute and convict suspects and, if more than one country has jurisdiction, which claim shall prevail?

The establishment of jurisdiction is a domestic affair. Each country decides for itself whether it has jurisdiction or not. Given that not every country uses the same standards for exercising jurisdiction, this can lead to two sorts of jurisdictional conflicts: negative and positive ones. A negative jurisdictional conflict arises when no particular country claims jurisdiction. One reason for not claiming jurisdiction may lie in the absence of domestic legislation that establishes jurisdiction over the conduct. Another reason to abstain from claiming jurisdiction could lie in the insignificance of the harm done to other countries or in the lack of means or the unwillingness to prosecute of the country in which the perpetrator resides.⁵² This results in the impunity of the perpetrator. The exact opposite holds true for positive jurisdictional conflicts, i.e., when several jurisdictions seek to prosecute a criminal at the same time based on the same course of conduct.⁵³ This situation raises the danger of over-criminalization of activities and double jeopardy.⁵⁴

Traditional jurisdiction provisions are based on the principle of territoriality. This entails that '[a] nation (or a state) had jurisdiction to prescribe what was and was not proper conduct within its physical territory and had jurisdiction to enforce prescriptions against actors whose unlawful conduct had occurred within its territory'.⁵⁵ Although many countries have expanded their jurisdiction provisions over the past few decades to include other factors such as nationality of the perpetrator, nationality of the victim or universality as well, the principle of territoriality remains the normal basis for the exercise of jurisdiction.⁵⁶

The principle of territoriality is usually understood to include the 'location of the act' only. Jurisdiction is based upon a person having been physically present within a country's territory at the time the offense was committed. If a country would hold on to the principle of territoriality, this could seriously hamper prosecution and conviction of international

⁵¹ National Center for Victims of Crime, *Model Stalking Code Revisited*, p. 17.

⁵² B.-J. Koops and S. W. Brenner, 'Cybercrime jurisdiction – An introduction' in B.-J. Koops and S. W. Brenner (eds.), *Cybercrime and Jurisdiction: A Global Survey* (Den Haag: T.M.C. Asser Press, (IT & Law 11), 2006, pp. 1-8 at p.6. Technically, it is incorrect to refer to these cases as negative *jurisdictional* conflicts, since the conflict does not derive from a lack of jurisdiction.

⁵³ A positive jurisdictional conflict is '(...) a situation in which more than one country claims jurisdiction over a perpetrator based on the same general course of conduct.' (S.W. Brenner, 'The next step: Prioritizing jurisdiction' in Koops and Brenner, *Cybercrime and Jurisdiction*, pp. 327-349 at p. 328)

⁵⁴ N. Cox, 'Cybercrime and jurisdiction in New Zealand' in Koops and Brenner, *Cybercrime and Jurisdiction*, pp. 273-291 at p. 289-290.

⁵⁵ Koops and Brenner, 'Cybercrime jurisdiction', p. 4-5.

⁵⁶ *Ibid.*

(cyber)stalking. Take the case where a person (A) resides in a country that adheres to the territoriality principle in which only the 'location of the act' constitutes jurisdiction. Imagine that this person is stalked through the internet by perpetrator (B) who lives in a different country and who exclusively operates from his home country. If B's country of residence is unwilling to prosecute the perpetrator, then A would be left empty-handed, despite the possible presence of anti-stalking legislation in his or her own country. In practice, this problem appears to become more and more obsolete, since the principle of ubiquity – the principle that takes the location of the act *and* the location of the result as constituents of jurisdiction – has been adopted by many states over the past fifty years. It is expected to become 'the dominant criterion among countries that belong to the civil-law tradition.'⁵⁷ However, until all countries pass similar legislation the risk of negative jurisdictional conflict remains.

When it comes to the risks of concurrent jurisdiction, there are probably fewer difficulties. First of all, conflicts of jurisdiction are very rare and when they occurred in the past they were always solved at a practical level. The decisive consideration usually was which jurisdiction had the best chances 'for successful prosecution and adjudication of the particular case'.⁵⁸ It seems that states take on a very pragmatic approach to resolve positive jurisdictional conflicts. In the past, when conflicts of this nature arose in cases of high-sea piracy, the state that apprehended the pirates was automatically granted jurisdiction.⁵⁹ It is not for nothing that the Convention on Cybercrime trusts signatory states to solve situations of multiple jurisdiction informally.⁶⁰ There are no indications to presume that things would go differently in cases of international stalking.

Some authors have wondered whether international cybercrimes – a category that would include international cyberstalking – deserve specific jurisdiction legislation, since the territorial and the ubiquity criterion may pose difficulties in the immaterial world of the internet. On whose 'territory' is a cybercrime supposed to have taken place if the crime consists of 'immaterial bits and bytes' that may travel arbitrarily around the world?⁶¹ And whose claims should be given priority if for example a virus infects computers in numerous countries? Still, these difficulties seem of less importance when stalking is concerned. In most cyberstalking cases there is often only one identifiable offender operating from behind a computer in a certain country and one identifiable victim receiving the messages in another country.⁶² This generally leads to an easily determinable location of the criminal act and a just as easily determinable location of the result, namely the country from which the messages were sent and the country in which the harassing e-mails were received and where the victim, as a consequence, experienced the harassment. International stalking cases therefore usually do not involve more than two countries. It is highly theoretical to presume that the countries whose local internet switches accidentally have processed the online data would claim jurisdiction, given that 'a nation can only exercise jurisdiction to prescribe when the exercise

⁵⁷ R. Zúñiga and F. Londoño, 'Cybercrime and jurisdiction in Chile' in Koops and Brenner, *Cybercrime and Jurisdiction*, pp. 141-155 at p. 152.

⁵⁸ S.W. Brenner, 'The next step', p. 330.

⁵⁹ *Ibid.*, p. 333-334.

⁶⁰ Council of Europe Convention on Cybercrime, Budapest, 23 November 2001, ETS No 185, into force 1 July 2004, Article 22(5).

⁶¹ Koops and Brenner, 'Cybercrime jurisdiction', p. 2.

⁶² In order not to complicate matters further the possibility that offender and victim are continuously travelling or relocating around the world is not considered. Neither is the possibility that a group of stalkers from different countries harasses only one single victim, as might be the case with so-called 'solicited stalking' or 'stalking by proxy', in which one person instigates other people to harass a victim, e.g., by placing an appeal on a weblog or an internet forum.

of such jurisdiction is reasonable'.⁶³ As explained before, both countries involved will probably be pragmatic enough to ascertain the forum that has the closest nexus to the case. On top of that, given the lack of interest that many countries have shown in criminalizing stalking or – when criminalized – in investigating and prosecuting the case, the problem most likely to occur will not be a multitude of countries 'fighting' over a stalking case, but a striking absence of countries with a prosecutorial desire. As it is, the ubiquity theory seems sufficient and easily applicable in cases of stalking.

6.2. Extradition

When (cyber)stalking has an international component, the collection of evidence and the extradition or surrender of the suspect will require assistance from foreign agencies. In the international community this assistance is often laid down in multi- or unilateral treaties that describe in which cases and to what extent assistance will be given and under which circumstances the gathered evidence or the fugitive suspects or convicts will be handed over to the requesting authorities.

Within traditional extradition procedures the requesting state has to submit a request for extradition to the appropriate authorities with a reference to the relevant legal provisions and an accurate legal description of the offence for which extradition is requested.⁶⁴ The requested state can judge on the basis of this information whether the fact meets the principle of dual criminality – the principle that extradition will only occur if both the requesting and the executing country recognize the behaviour as a crime. Usually, extradition schemes require an 'aggravated double criminality',⁶⁵ which means that the fact not only has to be criminalized in the requested country, but also that the maximum penalty in *both countries* consists of at least one year imprisonment.⁶⁶ When the extradition is requested for the execution of a verdict, the treaties furthermore require that the sentence carries at least a four months imprisonment. As regards dual criminality, it is not required that the criminal provision of the requesting state has the same qualification as the one in the requested state. It is only relevant whether the provision basically protects the same right.⁶⁷ In other words, extradition involves the conduct rather than the specific elements of the criminal provision. This requirement needs to be interpreted broadly.⁶⁸

In stalking cases the dual criminality requirement poses several difficulties. The most obvious problem is that stalking as such is not criminalized in many countries, thereby already seriously hampering the fulfilment of the principle of dual criminality. And in case both countries do have anti-stalking legislation, the additional requirement of a maximum penalty of one year could be problematic as well. Malta, for example, punishes stalking behaviour with a maximum imprisonment of only 6 months. Furthermore, when extradition is requested in order to execute a verdict, the lenient attitude of most judges will make the four months imprisonment threshold practically unfeasible. Finally, although dual criminality does not require the same qualifications or even the same wordings of the anti-stalking provision in

⁶³ Koops and Brenner, 'Cybercrime jurisdiction', p. 5.

⁶⁴ For example, art. 12 European Convention on Extradition, Paris, 13 December 1957, in force 18 April 1960, ETS 24.

⁶⁵ V.H. Glerum and N. Rozemond, 'Overlevering en uitlevering' in Sliedregt, Sjöcrona and Orie, *Handboek Internationaal Strafrecht*, pp. 139-244 at p. 196.

⁶⁶ For instance, article 5 (1) subparagraph a of the Dutch Extradition Act (*Uitleveringswet*). The minimum of one year imprisonment is not required for extradition to member states of the European Union if treaties between the Netherlands and those member states prescribe a different maximum penalty (article 6 (1) Dutch Extradition Act).

⁶⁷ At least, according to the Dutch Supreme Court (HR 30 augustus 2004, *NJ* 2004, 552).

⁶⁸ HR 30 augustus 2005, *NJ* 2005, 541.

both countries, the requirement that the provisions basically need to protect the same right may prove to be precarious nevertheless. If one country has implemented anti-stalking legislation in order to protect a person's privacy, whereas the other country was predominantly motivated by the desire to guarantee its citizens a life free from anxiety and fear, than even a broad interpretation of dual criminality may fail to bridge the differences.

With the introduction of the European Arrest Warrant (EAW) and the expiration of the implementation deadline on the first of January 2004 the classical extradition procedures between the Member States of the European Union were replaced by a faster and simpler surrender procedure.⁶⁹ One implication of this is that instead of requesting cooperation, member-states are now able to order assistance. The Member States are in principle under the obligation to cooperate when requested by another Member State, so the requirement of dual criminality is seriously restricted. The warrant may be issued if the person whose return is desired is accused of an offence for which the maximum penalty *in the issuing country* is at least a year in prison, or if he or she has been sentenced to a prison term of at least four months.⁷⁰

Especially the abolishment of the dual criminality principle simplifies procedures. However, the dual criminality principle is only abolished for thirty-two categories of offences that are punishable in the issuing Member State with a prison term of at least three years.⁷¹ Although the list of offences does contain acts that may form part of the stalking, like computer-related crime, rape and grievous bodily, stalking as such is not included. This means that the extradition of stalkers remains subjected to the condition that stalking is an offence under the law of the executing Member State.⁷² In the Netherlands, as in most other countries, the principle of dual criminality reapplies again.⁷³

The EAW is only applicable to member-states of the European Union. For countries and states that do not belong to this legal domain, the European Convention on Extradition of 1957 may apply. Although the requirement of dual criminality is also no longer explicitly mentioned in the European Convention on Extradition one can deduce from the many reservations that states are still reluctant to extradite citizens or to submerge them to foreign coercive means or punishment when the conduct under investigation is not considered criminal under national law.⁷⁴ So when the conduct is not criminalized in both the requesting and the assisting country or, in other words, when the requirement of dual criminality is not met, these treaties are often not applicable.

6.3. International legal assistance

At times the collection of evidence in stalking cases can be laborious. For example, in order to link the cyberstalker with the crime it is necessary to identify the computer system from which the harassing messages were sent. In case this system is unknown, one needs to follow the trail from the computer of the victim back to the stalker's system. Sometimes information

⁶⁹ M.J. Borgers and J.M. Sjöcrona, 'Europees straf(proces)recht' in E. van Sliedregt, J.M. Sjöcrona and A.M.M. Orie (eds.) *Handboek Internationaal Strafrecht: Schets van het Europese en Internationale Strafrecht* (Deventer: Kluwer, 2008) pp. 93-137 at p. 117.

⁷⁰ *Ibid.* art. 2 (1) subparagraph 1.

⁷¹ Article 2 (2) of the Framework Decision on the European arrest warrant.

⁷² *Ibid.* article 2 (4).

⁷³ Article 7 (1) subparagraph 2 Dutch Surrender Act (*Overleveringswet*).

⁷⁴ Some countries, such as Brazil, as a rule refuse to extradite their citizens (R. Chacon de Albuquerque, 'Cybercrime and jurisdiction in Brazil: From extraterritorial to ultraterritorial jurisdiction', in Koops and Brenner, *Cybercrime and Jurisdiction*, pp. 111-140 at p. 129). And Japan only ratified two extradition treaties; with the U.S. and Korea (P.C. Reich, 'Cybercrime and jurisdiction in Japan', in Koops and Brenner, *Cybercrime and Jurisdiction*, pp. 241-255 at p. 252).

that was stored by service providers is needed to identify the source. Once the computer system is identified and located, investigation and prosecution agencies need to prove that it was the suspect who sent the prohibited e-mails or who posted the slander on a bulletin board. Especially when perpetrator and victim are located in different jurisdictions, the legal assistance of foreign police officers or prosecutors can be required. Next to the extradition, international cooperation in criminal cases can therefore exist of carrying out an investigation or executing compulsory powers such as the execution of a search warrant, the taping of confidential telecommunication or the seizure of goods.

There exist two basic forms of international legal assistance, i.e., informal and formal assistance. The first, sometimes referred to as 'investigator-to-investigator assistance',⁷⁵ occurs when investigators share information and provide assistance to each other without prior legal arrangements thereto. When the information sought is publicly available, this is an easy option, but when coercive powers are invoked, the cooperation will have to be based on formal legal assistance regimes under international law. Within formal international legal assistance one can distinguish between a) cooperation based on the traditional legal assistance on request under international law or b) cooperation based on the execution of an order based on an EU instrument of mutual recognition. Traditional schemes of international legal assistance depart from the law of the requested state, whereas mutual recognition co-operations depart from the law of the requesting country in determining whether a request for legal assistance can and will be followed up.⁷⁶ Much is also dependent on the attitude of a certain country towards international legal assistance and international political relations. In the Netherlands nearly every request for legal assistance is complied with. The rule applies that 'whatever is allowed under national law, that is in principle allowed under mutual legal assistance as well'.⁷⁷ In other countries, providing help to foreign requesting authorities is not standard practice. International co-operation in Chile is, for instance, rare and Japan has only ratified one bilateral mutual legal assistance treaty.⁷⁸

Although informal assistance is the norm – judicial authorities are said to exchange information on a large scale⁷⁹ - in (cyber)stalking cases informal requests are probably less useful, since the evidence required often involves coercive powers which can only be obtained through formal means.⁸⁰ An investigation may involve the seizure of goods (e.g., a server) or the disclosure of information by a foreign communication service provider. Even though legal assistance treaties generally require that states afford each other mutual assistance to the widest extent possible, the process of formal mutual assistance is 'notoriously slow and bureaucratic'.⁸¹

There are, however, tendencies to make mutual legal assistance more efficient and less time-consuming. Where domestic laws or treaties may require dual criminality as a precondition for mutual assistance, the modern trend is to eliminate the principle of dual criminality to a large extent.⁸² The Council Framework Decision on the European evidence

⁷⁵ G. Urbas and P. Grabosky, 'Cybercrime and jurisdiction in Australia', in Koops and Brenner, *Cybercrime and Jurisdiction*, pp. 47-69 at p. 65.

⁷⁶ J.M. Reijntjes, M.R.B. Mos and J.M. Sjöcrona, 'Wederzijdse rechtshulp', in Van Sliedregt, Sjöcrona and Orie, *Handboek Internationaal Strafrecht*, pp. 245-301 at p. 296.

⁷⁷ *Ibid.*, p. 246.

⁷⁸ Chile (Zúñiga and Londoño, 'Cybercrime and jurisdiction in Chile', p. 154) and Japan (Reich, 'Cybercrime and jurisdiction in Japan', p. 252).

⁷⁹ J.-H. Lee 'Cybercrime and jurisdiction in the Republic of Korea' in Koops and Brenner, *Cybercrime and Jurisdiction* pp. 257-272 at p. 266.

⁸⁰ I. Walden, 'Cybercrime and jurisdiction in United Kingdom', in Koops and Brenner, *Cybercrime and Jurisdiction*, pp. 293-311 at p. 307.

⁸¹ Urbas and Grabosky, 'Cybercrime and jurisdiction in Australia', p. 65.

⁸² Reijntjes, Mos and Sjöcrona, 'Wederzijdse rechtshulp', p. 291.

warrant is a good example of this.⁸³ Together with the time limits that are set on mutual cooperation, the absence of dual criminality will accelerate and facilitate cross-border evidence collection. The Convention on Cybercrime is also in favour of eliminating dual criminality when it comes to the preservation of traffic data, because the preservation of traffic data is not considered that intrusive and because the establishment of dual criminality could take up a lot of time during which evidence may be destroyed. However, when requested for the seizure of goods, the principle of dual criminality generally still applies, with all the difficulties that were already touched upon in 6.2.

7. Council of Europe Convention on Cybercrime

So when certain behaviour is not criminalized in both the requesting and the assisting country extradition treaties are often not applicable. And when there exists no general or specific treaty between two countries, the investigation and prosecution of international crime is similarly hindered. Recognizing these issues, the Council of Europe drafted an international convention on cybercrime that would facilitate and stimulate the international investigation and prosecution of cybercrimes.

In response to the growing international concern over threats posed by computer-related crimes, the Council of Europe has published several studies and recommendations to address the need for new laws in this field. In July 2004 the joint efforts to combat computer-crimes resulted in the coming into force of the Council of Europe Convention on Cybercrime, the first - and to date only - binding international treaty on the subject. The convention provides a framework for international co-operation and it provides guidelines for governments who want to criminalize the conduct. Although the convention was developed within the framework of the Council of Europe, the convention is open to signature by non-European states as well. According to the status on 1 January 2009 the Convention was signed by 23 countries and ratified by another 23.⁸⁴ Apart from the European Member States, important countries such as the United States of America, Japan, Canada and South Africa have also signed – and in the case of the US ratified – the Convention. This implies that the countries with the highest grade of IT-penetration are already party to the Convention. Also several states that did not sign have voluntarily adopted (parts) of the Convention in their national legislation.

The aims of the convention are to harmonize cyber crime legislation; to harmonize criminal procedural legislation to gather electronic evidence and to facilitate international cooperation in the investigation and prosecution of computer crimes. In order to remove or minimize procedural and jurisdictional obstacles, the ratifying countries are required to 1) establish certain substantive offences in the area of cyber crime, 2) to adopt domestic procedural laws to investigate and prosecute computer crimes and 3) to provide a solid basis for international law enforcement cooperation in investigating and prosecuting these crimes.

To some of the provisions in the Convention there is room for ample reservations. The reason for this is that states differ significantly in which sort of behaviour they regard as serious or worthy of punishment. The provisions on child pornography, for example, are subjected to reservations from the United States, because of the first amendment, but also from state parties such as Japan, where child pornography is not as reprehensible as in most

⁸³ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ 2008, No. L350, 30 December 2008.

⁸⁴ This information can be found by searching for the Convention on Cybercrime on <www.conventions.coe.int>.

western countries.⁸⁵ Furthermore, the national definitions of, for example, forgery vary greatly.⁸⁶ As a result, the offences in the Convention are represented by a common minimal standard that states can extend upon in their domestic law.

Another manifestation of the legal differences that had to be bridged was the fact that certain behaviours were not criminalized at all. As the explanatory report already indicates, the committee only included a list of offences on which consensus could be reached. The committee discussed the inclusion of other offences, such as 'cyber-squatting',⁸⁷ but given the lack of support in favour of criminalization, they discarded them again. The only exception to this rule was the content-related offence of distributing racist propaganda through computer systems. Many delegations were strongly in favour of such criminalization, but some expressed concerns regarding the possible damage it could do to the freedom of expression. Due to the complexity of the issue, consensus could not be reached. However, instead of discarding the topic altogether, the committee decided to refer the issue to the European Committee on Crime Problems who, in turn, were to draft an additional protocol to the Convention.⁸⁸

Whether cyberstalking was discussed and explicitly rejected cannot be distinguished from the explanatory report, since it makes no mention of it. According to judge Stein Schjøberg, a member of the High Level Expert Group that drafted the Convention, cyberstalking was indeed not considered as part of the recommendations at all.⁸⁹ The topic of cyberstalking was never even brought up during the negotiations, since it had not raised a great deal of awareness. The Convention does criminalize certain behaviour that can constitute international cyberstalking. If the stalker illegally gains access to the victim's computer ('hacking'); illegally intercepts e-mails or other electronic data transfer; intentionally inflicts damage on the data stored in the computer of the victim; or sabotages his or her computer then this behaviour is covered by the Convention.⁹⁰ Just as vandalism, threat and battering were subjected to penalty long before the Californian legislator had even heard of the social construct of stalking, so are certain aspects of cyberstalking prohibited in the Convention as well. But just as in the offline world, these miscellaneous incidents often do not cover stalking in its entirety, they do not cover the repetitiveness that victims find so disturbing and they do not cover some of the most alarming behaviours such as the sending of e-mails with a threatening content or the spread of slander through the internet.

So apart from the situation where the stalker employs tactics that are explicitly prohibited in its text, the Convention on Cybercrime does not offer any stimulus to signatory states to criminalise harassment through the internet or other means of telecommunication. This is a missed opportunity, since an inspiring and harmonizing effect could be expected from inclusion. One of the aims of the Convention is to bring national criminal political goals in the area of cybercrime closer to each other. As long as cyberstalking is not on the political agenda of a substantial part of the signatory countries, the chances of ever having cyberstalking included – albeit in the form of an additional protocol – are small.

8. Conclusion

⁸⁵ Kaspersen, 2004.

⁸⁶ Explanatory Report of the Convention on Cybercrime, consideration 82.

⁸⁷ *Ibid.* consideration 42.

⁸⁸ *Ibid.* consideration 35.

⁸⁹ This information was given to the author during an e-mail conversation with judge Schjøberg.

⁹⁰ Convention on Cybercrime, articles 2, 3, 4 and 5.

Although there is no exact estimate of the prevalence of international (cyber)stalking as such,⁹¹ the fact that there is or will be a problem seems apparent. Even if the possibility of international cyberstalking may seem rather theoretical to date, developments like *Youtube*, *Hyves* and *SecondLife* have a more international character and users are bound to come into contact with people of different nationalities. Currently, there is no universal protection against (cyber)stalking,⁹² but in the light of the expected growth of international (cyber)stalking in both size and complexity, international agreement and cooperation on the matter do seem necessary.

There appear to be four impediments to the international investigation and prosecution of (cyber)stalking. First, there are discrepancies between different jurisdictions as to what conduct is criminalized and what not. Sovereign states are allowed to design their criminal laws in the way they see fit and therefore, a certain conduct can be prohibited in one country, while it is perfectly legal in another. As a result, (cyber)stalkers can be protected under the law of the state in which they reside, while their harassment can have an effect on the territory of a state that does prohibit the behaviour. The second problem is that the criminal provisions in states that have criminalized (cyber)stalking are not in accordance with each other. In some states the reaction of the victim is a constitutive element of the crime, others require specific or general intent on the part of the stalker and yet others place emphasis on a list with specific stalking behaviours. As a result of the first two discrepancies, international co-operation can be complicated. This is the third problem. Given the international nature of certain stalking cases, it is crucial that law enforcement agents can call in the assistance of colleagues in other countries. Criminal investigators are generally only allowed to exercise their investigative authorities within the state boundaries unless they have permission to expand their search to other territories and the same goes for foreign investigators. Due to the aforementioned divergences the principle of dual criminality could form a barrier for extradition and sometimes for international legal assistance as well. The biggest problem, however, is the danger of negative jurisdictional conflicts, where the stalker gets away with impunity, because none of the countries involved claims jurisdiction. It is often already a delicate task to have policemen take an interest in stalking matters when the conduct takes place within the domain of one jurisdiction only, let alone when an international component comes to play. The conduct is trivialized or at least not taken up by the local authorities.

To improve the investigation and prosecution of international (cyber)stalking it would be a good strategy to encourage harmonisation of laws and to improve international collaboration in the field. Given that the authoritative prescription of rules such as the U.S. federal anti-stalking law is impossible within an international context that is governed by state sovereignty, it is a good idea to first make sure that national governments are aware of the intrusiveness and seriousness of stalking and the detrimental effects that it can have on people's lives.⁹³ Solid training programs and national campaigns to raise awareness amongst local policemen and other criminal justice officials should not be forgotten either. If more countries were to criminalize the conduct there would be more bearing power to facilitate

⁹¹ Although it should be noted that cyberstalking does not differ from other cybercrimes in this respect. The committee that drafted the Council of Europe Convention on Cybercrime contends that one of the major challenges in combating cybercrime is assessing the extent and impact of the criminal act (Explanatory Report of the Convention on Cybercrime, consideration 133).

⁹² L. Ellison and Y. Akdeniz, 'Cyber-stalking: The Regulation of Harassment on the Internet', (1998) spec. ed. Criminal Justice and the Internet *Criminal Law Review*, 29-48.

⁹³ The mention of stalking as a conduct that should be declared a breach of law by Women Against Violence Europe during an expert group meeting of the UN Division for the Advancement of Women is a good start. (Issues brief prepared by WAVE (Women Against Violence Europe) *Violence against women: Good practices in combating and eliminating violence against women*, Expert Group Meeting, Organized by: UN Division for the Advancement of Women, Vienna, Austria, 17 to 20 May 2005).

international investigation and prosecution and, perhaps, even to come to the creation of international standards. Although an insertion of the crime of cyberstalking in the Cybercrime Convention or the European Arrest Warrant may be a little premature to date, it could become an option in the future once stalking forms part of the political agenda. Meanwhile, the creation of a Model Code after the American model, would be helpful in harmonizing the existent domestic provisions and in inspiring countries that have not criminalized the conduct yet. Since the perception of stalking appears to be slowly converging across jurisdictions and cultures, the drafting of such a Model Code becomes less and less problematic. After analysing many definitions of stalking Groenen found out that stalking always boils down to “repetitive behaviour that is unwanted by the person at whom the behaviour is directed”.⁹⁴ A Model Code could depart from this common theme. Given the trend to abolish or at least seriously diminish the importance of the ‘fear’-requirement, the Model Code should either completely disregard the effect that stalking can have on the individual victim or it should take the ‘reasonable person’ as a standard. Finally, from the perspective of the international fight against stalking, the current trend of abandoning the principle of dual criminality within extradition and legal assistance and the adoption of the principle of ubiquity as a standard for the establishment of jurisdiction are to be applauded as well.

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⁹⁴ Groenen, Stalking: Risicofactoren voor fysiek geweld, p. 43.

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